publishing statements meant by him to apply to one of his neighbors.[6]

Where two theories so widely divergent appear each to have a sound basis in legal philosophy, the criterion of liability must of necessity be found by an application of the dictates of common sense and convenience. Fletcher-Moulton, L. J., points out to what absurdities a logical extension of his colleagues' judgment must lead.[7] Since an action of libel will lie although no name has been used, a public speaker may bring upon himself very serious consequences by innocently introducing a hypothetical case to illustrate a point in his discourse. So a statement true of the John Smith "of and concerning" whom the defendant wrote, may give to a hundred other John Smiths a cause of action against the publisher. If it be said that by ascertaining the truth of his statement with regard to one John Smith the publisher has thereby discharged his duty of carefulness towards his neighbors, it may well be answered that this is an arbitrary rule and that, if the severe doctrine be carried out to its logical limits, a publisher should be obliged to make it plain and unquestionable which of the hundred and one John Smiths he intended. In the words of Fletcher-Moulton, L. J., "It would indeed be a calamity if our English law of defamation burdened ordinary speech or writing with such a chaos of responsibilities." The milder rule seems more in accord with common sense and convenience than the stringent rule set forth by the majority of the English Court.

S. L.

False Representations of Principal and Agent.

It seems reasonably clear that an innocent principal is liable in tort for deceit, if his agent deliberately makes false representations, or makes them in conscious ignorance of their truth or falsity, while acting within the scope of his authority. The idea underlying this doctrine appears to be that the principal cannot employ an agent and retain the benefit of his services without assuming full responsibility for the frauds of the agent as well as for his other torts.

A few cases hold that this liability of the principal need not be based upon the tort of the agent, but may be referred to the contract, as on a breach of warranty. Thus, where an agent was authorized to make material and false representa-

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[6] *Every Evening Printing Co.* v. *Butler*, 144 Fed. 916 (1906).

[7] L. R. (1909), ii K. B. D. 475.

tions as to existing facts, which were capable of exact knowledge, even though both principal and agent believed the representations to be true, and those representations induced the contract, the principal was held liable on the contract for the damages actually suffered in the case of *Wimple et al* v. *Patterson*.[1] The court advanced the proposition that in such cases "the liability of the principal need not be rested upon the tort, but may be referred to the contract, for whether made innocently or deceitfully, such representations against the seller operate as a warranty." The Texas case cited in support of this conclusion apparently sustains it,[2] but the only outside authority referred to does not.[3] All the latter case decides is that a principal is liable in an action of tort for the fraudulent misrepresentation of his agent made within the scope of his authority, which is self-evident. It is submitted that there is a distinction between permitting an action against the principal in tort for the fraudulent misrepresentations of his agent, and allowing an action against the principal on the contract as for a breach of warranty. A representation is not necessarily a warranty; the latter is a part of the contract, the former precedes and induces the contract. In case of breach of warranty the contract remains binding and damages only are recoverable for the breach; whereas upon a false representation, the defrauded party may rescind the contract and recover as damages the entire price paid. The same transaction cannot be a warranty and a fraud at the same time, for the one is a part of the contract, the other is a tort collateral to the contract. If this is correct, it will be seen that the case cited (*Rhoda* v. *Annis*) is no authority for the conclusion reached in *Wimple* v. *Patterson*.

If the false representations, innocently made, were not authorized by the principal, and were made without his knowledge, but within the apparent scope of the agent's authority, some cases hold that the principal is not liable, even though he receives the benefit of the contract.[4] See the celebrated case of *Cornfoot* v. *Fowke*[5] the agent represented that there was no objection to a house he was authorized to let, whereas, un-

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[1] 117 S. W. 1034.

[2] *Loper* v. *Robinson*, 54 Tex. 510.

[3] *Rhoda* v. *Annis*, 75 Me. 17.

[4] In *Deaker* v. *Fredericks*, 47 N. J. Law (18 Vroom), 469, the Court held that the principal is not liable for the false representation of his special agent where the latter was authorized only to sell the horse as he stood, without representations or warranties.

[5] 6 M. & W., 358.

known to him, but known to the principal, there was a brothel next door. The lessee pleaded the fraud in defense to an action for rent. The plea was held bad, although it would have been good if the principal were shown to have intentionally concealed the circumstances from the agent. However, what this case really decided was that it was error to tell the jury without qualification, "that the representations of the agent must have the same effect as if made by the principal himself," the plea averring fraud without qualification.[6] This case must be considered at flatly contra to *Wimple* v. *Patterson*, and is in accordance with the doctrine in England that to hold the principal liable it is necessary to lay the action with a scienter, and prove that he was guilty of some intentional concealment of the facts innocently misrepresented by the agent.[7] Therefore, what would have amounted to fraud had the agent possessed the knowledge of the principal when he made the misrepresentations is not fraud when the principal knows, but does not disclose, the real circumstances, which are innocently misrepresented by the agent, without the knowledge of the principal.

This case effectually disposes of the fiction of identity of principal and agent, advocated by a few writers; and also seems to repudiate the doctrine that seems to us the more reasonable, that a principal ought not to retain the benefit of a contract without assuming full responsibility for the means by which the contract was induced; which is, after all, nothing more nor less than a purely quasi-contractual obligation. And there is plenty of authority for the latter view. See *Reitman* v. *Fiorillo*,[8] where it was held that an innocent principal cannot assert any rights or retain any benefits upon a contract when it is procured by the fraud of his agent; and where an agent effected a sale of land for his principal by false representations, without the authority or knowledge of the principal, the latter was held liable for the fraud in the same manner as if he had known or authorized it in *Law* v. *Grant*.[9] The recent Pennsylvania case of *Shultheis* v. *Sellers*[10] is in line with these decisions. Here the defendant was the maker of a promissory note which he had been induced to sign by the false representations of the agent of a publishing house as part consideration for a set of books. The note was payable to the agent, and had been endorsed to the plaintiff, who failed to establish the

[6] Pollock's Torts, 5th Ed., p. 291.
[7] *Peak* v. *Derry*, L. R. 14 Ap. Cas. 541.
[8] 72 Atl. R. 74.
[9] 37 Wis. 548.
[10] 223 Pa. 513.

fact that he held the note without knowledge of the fraud. It was not alleged that the agent was an expert and knew that his representations as to the character and quality of the books were false, nor that the publishers authorized the agent to make the representations. It was held, *inter alia*, that the publishers could not affirm the action of the agent in making the sale and not assume responsibility for his representations.

As for the liability of the agent under such circumstances, both reason and authority are in accord with the proposition that an agent is personally liable for false representations resulting in damage to others while acting within the apparent scope of his authority, whether those representations were authorized by the principal or not. But in *Wimple* v. *Patterson* the agent was held not liable, the Court holding that where an agent, acting within the scope of his authority so as to bind the principal honestly believes the representations made by him to induce the purchaser to contract with his principal to be true, to the damage of the purchaser, he is not liable either on the contract or as for the tort. That he is not liable on the contract is clear, for he was not a party to it; but whether he is liable in tort for the deceit depends upon whether in a given jurisdiction the scienter must be proved. The peculiarity of *Wimple* v. *Patterson* lies in the fact it was not necessary to prove the scienter to hold the principal either on the contract as on a breach of warranty, or in tort for the deceit; whereas, in the case of the agent, the scienter must be proved to hold him liable in deceit.

G. H. B.